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No. 5

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH H. DOTTERWEICH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN REPLY

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MEMORANDUM FOR THE UNITED STATES IN REPLY

Respondent has not seriously endeavored in his brief to support the decision below on the ground relied on by the court. Instead he urges grounds which, we submit, the court below properly decided against him for the reasons hereinafter set forth.[1]

I. ADMINISTRATIVE NOTICE AND HEARING AS PROVIDED BY SECTION 305 ARE NOT A JURISDICTIONAL PREREQUISITE TO PROSECUTION UNDER THE ACT

In Point I of respondent's brief (pp. 10–15) he contends that under Section 305 (21 U. S. C.

[1] Point Two of respondent's brief (pp. 15–21) is evidently intended to support the decision below on the ground relied on by the court. It contains, we believe, nothing not answered in the opening brief of the United States.

335) a notice addressed to him personally was a condition precedent to his lawful prosecution, and that the court below erred in holding (R. 179) that the provision of Section 305 for administrative notice and hearing "was an administrative direction to the Administrator rather than a jurisdictional requirement for criminal proceedings." The statutory notice was in fact given to the corporate defendant and answered by respondent as its general manager. (See R. 114–115, 167, 178–179). However, we need not consider the sufficiency as to respondent of a notice addressed to the corporation, since it is clear that as to any defendant the provision for administrative notice and hearing is no more than a direction to the Administrator.

This was the holding of *United States* v. *Morgan*, 222 U. S. 274, under the comparable provision of Section 4 of the Pure Food and Drugs Act of 1906 (c. 3915, 34 Stat. 768, 769). Under Section 5 of that Act a United States attorney was required to institute criminal proceedings upon a report by the Secretary of Agriculture of a violation, and also upon the presentation to the district attorney, by state health officials, of satisfactory evidence of a violation. But there was no requirement of administrative notice and hearing by state health officials before reporting a violation to the district attorney; and this Court therefore concluded that "the very fact that he

must" institute proceedings on their presentation to him of satisfactory evidence of a violation "recognizes that he may begin proceedings against a defendant who has not been given a notice and an opportunity to be heard," and that "the fact that the statute compels him to act in one case, does not deprive him of the power voluntarily to proceed in that and every other case under his general powers" (222 U. S., at 280, 281).[2]

Contrary to respondent's contention (Br. 11) that the phraseology of Section 305 of the 1938 Act indicates an intention to avoid the result of the *Morgan* decision, the 1938 Act strengthens the basis for the application of that decision by omitting any provision making it mandatory in any case for a district attorney to institute criminal proceedings upon the recommendation of the Federal Security Administrator. See *Helco Products Co., Inc.* v. *McNutt* (App. D. C.), decided June 28, 1943. And the legislative history of the 1938 Act clearly sustains the conclusion of the court below in this case, and of the court in *United States* v. *Commercial Creamery Co.*, 43 F.

[2] This Court also emphasized (222 U. S., at 281–282) that "there is certainly no presumption that a law passed in the interest of the public health was to hamper district attorneys, curtail the powers of grand juries or make them, with evidence in hand, halt in their investigation and await the action of the Department [of Agriculture]. To graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will."

Supp. 714, 715 (E. D. Wash.), that no change from this Court's construction of Section 4 of the 1906 Act was effected. One of the several bills introduced (S. 5, 75th Cong., 1st sess.), had it been enacted in its original form, would have given support to respondent's position, by providing expressly as follows:

> SEC. 7. Before reporting any violation of this Act to any United States attorney for institution of criminal proceedings, the Secretary shall, in accordance with regulations prescribed by him, afford appropriate notice and opportunity for hearing to the person against whom the proceedings are contemplated. * * *
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> * * * * *
>
> SEC. 9. It shall be the duty of each United States attorney to whom the Secretary, *consistently with the provisions of sections 6 and 7,* reports any violation for institution of criminal, libel of information for condemnation, or other proceedings under this Act, or to whom any health, food, or drug officer of any State or Territory, or political subdivision thereof, presents evidence satisfactory to the United State attorney of any such violation *and that appropriate notice and opportunity for hearing has been afforded to the person against whom the proceedings are contemplated,* to cause appropriate proceedings to be instituted in the proper courts

of the United States without delay. * * * [Italics supplied.] [3]

As the bill was reported out of committee to the Senate on February 15, 1937, the specific requirement of a finding by the United States attorney that notice and hearing have been afforded was limited to criminal proceedings;[4] and in this form the bill passed the Senate on March 9, 1937.[5] It was referred to the House Committee on Interstate and Foreign Commerce, of which Representative Lea, of California, was chairman.[6] A subcommittee of that committee prepared and recommended a draft known as Committee Print No. 3, of August 19, 1937,[7] and S. 5 was reported by the committee to the House in this form on April 14, 1938.[8] Section 305 thereof was the same as Section 305 of the law as finally enacted, except for the later insertion of the words "by the Secretary;" and the provision of Section 9 of S. 5, as it had passed the Senate, was wholly eliminated. On the floor of the House, Representatives Lowey and Clason objected to Section 305 on the ground

[3] See Dunn, Federal Food, Drug, and Cosmetic Act: A Statement of Its Legislative Record (New York, 1938), p. 643.

[4] See Dunn, *op. cit.*, *supra*, note 3, p. 663.

[5] 81 Cong. Rec. 2019 (1937).

[6] 81 Cong. Rec. 2096 (1937).

[7] See Dunn, *op. cit.*, *supra*, note 3, p. 752.

[8] 83 Cong. Rec. 5465 (1938); H. Rep. 2139, 75th Cong., 3d sess.

that it would, in their opinion, confer upon an administrative agency the power to determine whether criminal proceedings should or should not be instituted and would bring about delays in prosecution.[9] In reply Mr. Lea, who was chairman of the subcommittee that had prepared, and of the committee which had reported, the House bill, stated that under Section 305 "it is not necessary for the prosecuting attorney to await a report by the Department of Agriculture;" that Section 305 "simply refers to the administrative duty of the Secretary;" and that "The law speaks for itself, and there are no strings on the Department of Justice or on the grand jury. They can proceed whenever they like."[10] As a result there was no further discussion of Section 305. The bill with Section 305 unchanged passed the House,[11] the House and Senate conferees adopted the House bill;[12] and the Senate agreed to the conference report without debate.[13]

We therefore submit that the decision of this Court in the *Morgan* case and the legislative history of the 1938 Act provide a conclusive answer to respondent's contention on this point.

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[9] 83 Cong. Rec. 7791–7794 (1938).

[10] 83 Cong. Rec. 7794 (1938). See, also, H. Rep. No. 2139, 75th Cong., 3d sess., p. 5 (Dunn, pp. 818–819): "Section 305 * * * merely requires continuation of a practice that has been followed in the enforcement of the present law."

[11] 83 Cong. Rec. 7903 (1938).

[12] H. Rept. No. 2716, 75th Cong., 3d sess.

[13] See 83 Cong. Rec. 8731–8738 (1938).

II. THE VERDICT IS SUPPORTED BY THE EVIDENCE

Respondent's contention that the verdict is not supported by the evidence (Br. 21–25) was considered by the court below and unanimously rejected (R. 178). Apparently in this Court respondent renews this contention only as to the second and third counts, which charged adulteration and misbranding of the digitalis tablets.

The Government, in its opening brief, p. 5, footnote 6, has set forth, with the record references, the history of the digitalis tablets in question. Respondent asserts, nonetheless, that the evidence does not establish that the deterioration of the tablets did not occur after Dr. Tagett, to whom Buffalo Pharmacal Co. had sold them, had received and opened them. The record is, however, not helpful to respondent. Dr. Tagett, called by the Government, testified that he kept the bottle in his drug room, adjoining his office, which he kept at a uniform, moderate temperature (R. 60). The bottle was kept tightly stoppered at all times except when the stopper had to be removed for tablets to be taken from the bottle (R. 60, 64). Dr. Tagett testified on cross-examination that in his experience digitalis tablets did not lose potency when kept as he kept them (R. 64–65).[14] The Food and Drug inspector who

[14] Respondent's counsel also elicited from Dr. Tagett on cross-examination the fact that a subsequent batch of digitalis which Dr. Tagett purchased from Buffalo Pharmacal Co. caused his patients nausea and vomiting (R. 63, 67).

obtained the bottle from Dr. Tagett testified that when he collected the bottle it was in the doctor's drug room, and was capped (R. 22). Dr. Chapman, an expert witness whom respondent's counsel had previously built up as one of the outstanding experts on digitalis (R. 82–83), testified that deterioration of the tablets under the conditions in which Dr. Tagett had kept them was "unlikely" (R. 107–108).[15] Moreover, he testified that any deterioration of digitalis tablets is most likely to occur in "the first few weeks" after preparation (R. 108). He also testified that if the tablets in question "had been prepared months before," they would not be likely to deteriorate under the conditions in which Dr. Tagett had kept them (R. 108). And, as the Government pointed out in its opening brief (p. 5, footnote 6), the record showed that the tablets in question had been prepared eleven months before defendants shipped them to Dr. Tagett, and there was no evidence of their strength when shipped. The verdict of the jury was adequately supported by the evidence.

Respondent has commented on the accuracy of the frog test, by which these tablets were assayed. This test was prescribed by the United States Pharmacopeia, p. 397, and therefore was the one which the Act required be used (R. 72–73, 74, 50, 52). The fact that this test was required because

[15] For corroborating testimony from other sources, see R. 55–56, 87–89, 90, 146.

it was, in expert opinion at that time, the most reliable one known, was made abundantly clear to the jury, by defendants' cross-examination as much as by anything else (R. 52, 74–76, 87, 91, 97–98, 100, 103). The manner and theory of its operation were explained to the jury by a Government pharmacologist (R. 74–77), who was excellently qualified as an expert (R. 70–71). Dr. Chapman, whom as previously noted respondent's counsel had built up as an expert, stated his belief in the merits of the frog test (R. 103). The only suggestion of inadequacy of the frog test came from insinuations of respondent's counsel (R. 53, 69, 83–84, 91, 103), which in the face of the expert testimony must not have impressed the jury.[16] The jury was justified in giving credence to the results of the frog test.[17]

III. THE BASIS OF THE DECISION BELOW

Perhaps a few words may appropriately be added regarding the construction of the statute

[16] Respondent was not denied the opportunity to offer proof on this point. The court ruled, when the Government objected to cross-examination on the merits of the frog test, that the defendants had the right to demonstrate it if experience showed the frog test inaccurate (R. 91).

[17] Significantly, defendants did not offer evidence of any assay of the tablets conducted by the cat test which they advocated. We are advised by the Food and Drug Administration that no possibility exists that these tablets, which were assayed at 42%, 48%, and 51% by frog tests (R. 52, 77, 98, 99), would have shown 80% strength or more, as required by the U. S. Pharmacopeia within the 20% tolerance allowed (R. 77, 107), if they had been assayed by the cat test.

upon which the decision below turned. Because of the separate guaranty provision (Sec. 303 (c)), the court read a limitation into Sections 201 and 301 (a), considered together, which would exclude from the penalties of the Act the activating agent of a corporation who is responsible for a violation. As pointed out in our main brief, this would go far to destroy the effectiveness of the statute and is an unnecessary interpretation. But for the guaranty provision such an agent would be liable. It seems unreasonable to hold that Congress intended by the wording of the guaranty to change this situation. A more reasonable approach in the light of the purpose of the Act would be to hold that the true meaning of the guaranty provision is that the guaranty applies when given by the person from whom the article was received, the natural purpose and meaning of the clause "from whom he received" the article. Identification of the recipient was not the Congressional aim. Thus read, concern as to minor employees is obviated—the guaranty would apply to them as well as the dealer.

The same result would be accomplished by construing the words of Section 301 (a), prohibiting the "introduction or delivery for introduction into interstate commerce", etc., as requiring a responsible act or omission, not merely a physical act: *i. e.*, as being directed at the persons whose failure to exercise the care and responsibility reposed in

them by the business organization resulted in the introduction into interstate commerce of the nonconforming goods. So construed the statute would reach the principal, the supervisory officials on whom the business organization bestows the responsibility of seeing that the business conforms to the law, and any minor employees whose acts, performed negligently or in bad faith and hence in violation of the obligation imposed on them, caused the violation of this Act. Acting negligently or in bad faith is in essence an assumption of responsibility even when done by a minor employee since the normal contemplation of authority to act is that the acts will be performed carefully and without wrongful intent. On such a construction, well-intentioned minor employees, whose place in the business organization prevents their knowledge of or authority to prevent the nonconformance of goods, would not be liable. This construction is not inconsistent with the textual requirements of Section 301 (a) since it does not require that Section 301 (a) be given a different meaning in prosecutions under Section 303 (b) than it has in prosecutions under Section 303 (a). Moreover it is reasonable, since it permits the accomplishment of the purposes of the Act. It permits the application of the felony provisions of Section 303 (b) to all persons in the chain of causation who act with intent to defraud or mislead, and of the milder provisions of Section

303 (a) to all persons whose improper exercise of supervisory power or whose negligent exercise of clerical authority directs the chain of causative responsibility to them. Prosecutions under the Act and the predecessor Act of 1906 have not sought to hold others.

CONCLUSION

The judgment of the court below should be reversed and that of the district court affirmed.

Respectfully submitted.

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